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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 85

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

BUZZY SKIDMORE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

WILLIAM C. COMER,
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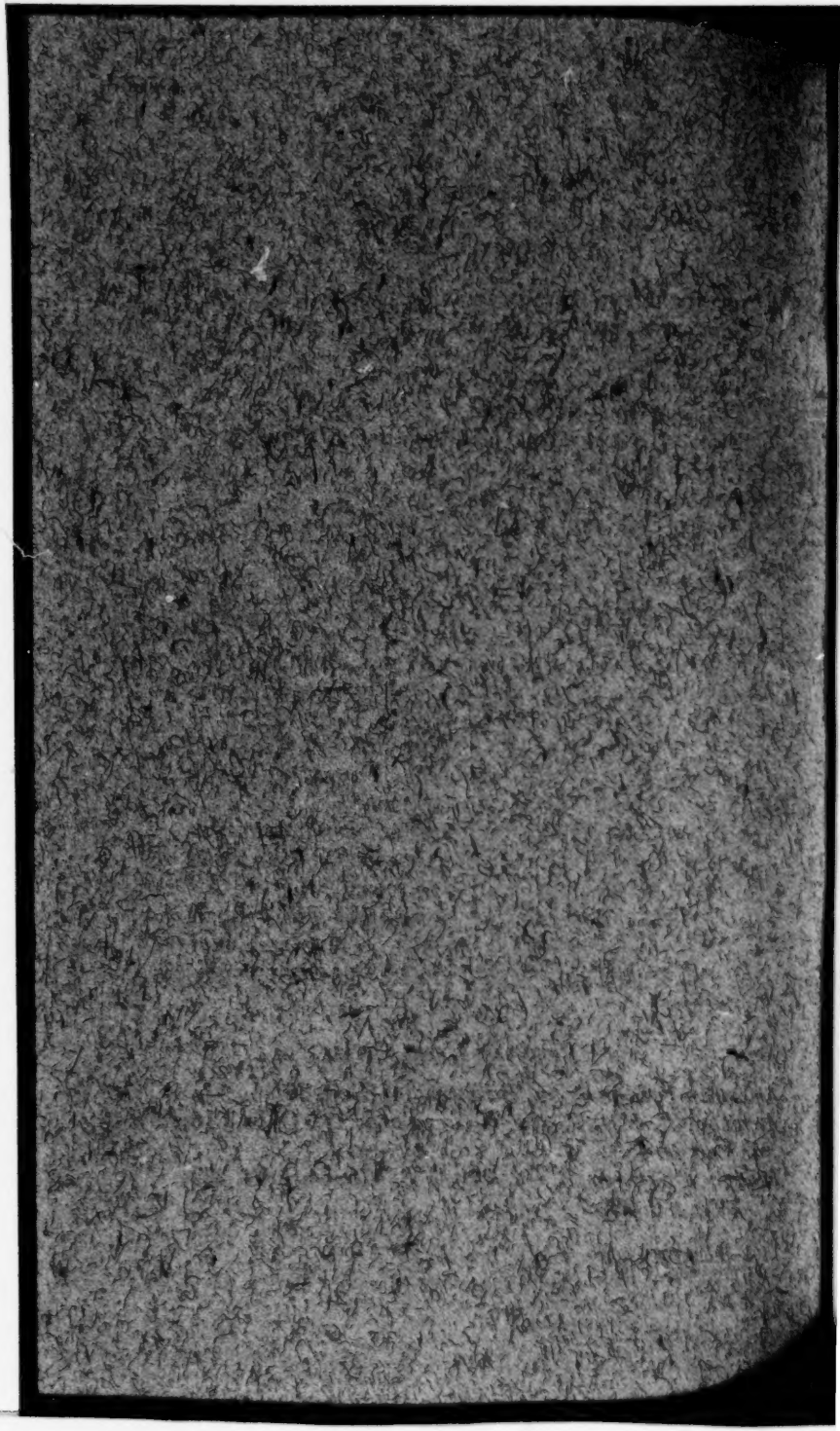

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No. 857

THE BALTIMORE AND OHIO RAILROAD COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Baltimore and Ohio Railroad Company respectfully shows:

Summary Statement of the Matter Involved

This action was instituted under the Federal Employers' Liability Act (35 Statutes 65, 66) by the Respondent against

Petitioner to recover damages for personal injuries sustained when the knees of employee-respondent slipped apart on ice under a coal car under which he had been working since 7:30 in the morning on January 19, 1945, in petitioner's repair yards at Lorain, Ohio. The slipping occurred at 3:30 in the afternoon (R. 31, 44).

The action was tried before Hon. Robert A. Inch, and a jury in the Eastern District of New York and resulted in a verdict of $30,000.00. The judgment entered upon the jury's verdict was appealed to the United States Circuit Court of Appeals for the Second Circuit. That Court affirmed the judgment (R. 341).

Motion for a non-suit and for a dismissal of the complaint was made at the close of the respondent's case and was renewed and extended to a directed verdict at the close of all of the evidence. They were denied and exceptions taken (R. 175, 231). After the verdict the petitioner moved for a directed verdict or for a new trial. Motion was denied (R. 298). Before the charge, petitioner requested the Trial Court to submit written questions to the jury for written answers with respect to the negligence of the defendant, the contributory negligence of the plaintiff, and damages. Request was denied and an exception taken (R. Exhibit C, pages 295, 233).

Jurisdictional Statement

Judgment was entered by the Circuit Court of Appeals for the Second Circuit on the 15th day of March, 1948 (R. 341). This petition was filed on the — day of —, 1948. The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code (28 U. S. C., § 347).

By its decision herein and the judgment entered thereon the Circuit Court of Appeals for the Second Circuit "has decided a Federal question in a way probably in conflict

with applicable decisions of this Court." (Supreme Court Rule 38, Paragraph 5 (b).) *Missouri Pacific Railway Company* v. *Aeby*, 275 U. S. 426; 48 S. Ct. 177; 721 L. Ed. 351.

The Questions Presented

I

Whether Petitioner-Railroad was negligent by reason of the natural accumulation of snow and ice in an outdoor repair yard that is about one quarter mile long and about 700 feet wide and where 150 workmen are employed.

II

Whether the Petitioner-Railroad was negligent by reason of employee-respondent, an experienced car-man, choosing and pursuing a method of work which was improper and dangerous, and without instructions from his employer.

III

Whether there was an abuse of discretion by the Trial Court in refusing to submit to the jury, as requested by the petitioner, written questions calling for written answers by it as to the issues of negligence, contributory negligence, and damages.

Reasons Relied Upon for Allowance of Writ

(1) The Circuit Court erred in holding that

> "The evidence was sufficient to justify the jury in concluding (a) that defendant (petitioner) directed plaintiff (respondent) to work in the manner and at the place in which he worked, and (b) that defendant was negligent, in requiring plaintiff to perform such services when defendant had not cleared the snow and ice under the car (R. 311).

(2) The Circuit Court erred in refusing to hold that the slipping on the ice and resulting injuries were occasioned solely by the negligence of respondent.

(3) Although the Circuit Court found

> "undeniably, the verdict affords no satisfactory information about the jury's findings" (R. 311),

and also stated

> "we deem such a verdict (special verdict) usually preferable to the opaque general verdict" (R. 333);

that Court erred in holding

> "the Federal District Judge, under the Rule (Rule 49—Federal Rules of Civil Procedure), has full, uncontrolled discretion in the matter" (R. 332);

and in also concluding

> "Accordingly, we cannot hold that a District Judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict * * *" (R. 333).

WHEREFORE, your Petitioner, The Baltimore and Ohio Railroad Company, prays that a Writ of Certiorari issue to review the judgment entered in the above cause on the 15th day of March 1948, in the United States Circuit Court of Appeals for the Second Circuit, said cause being #20862 on the docket of said Circuit Court.

Respectfully submitted,

BALTIMORE AND OHIO RAILROAD COMPANY,
By WILLIAM C. COMBS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 857

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

BUZZY SKIDMORE,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinions Below

The Opinions in the United States Circuit Court of Appeals, Second Circuit (Circuit Judges L. Hand, Swan and Frank, Judge Frank writing, and Judge Hand concurring in separate Opinion) was filed March 15, 1948, and appears at page 308 of the Record. They are as yet unreported.

Jurisdiction

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code (28 U. S. C., § 347). The Circuit Court of Appeals has in this case "decided a Federal question in a way probably in conflict with applicable decisions of

this Court." (Supreme Court Rule 38, Paragraph 5 (b).)

Judgment was entered in this case by the United States Circuit Court of Appeals for the Second Circuit on March 15, 1948.

Statement of the Case

In addition to the facts already set forth in the preceding Petition at pages 1 to —— the following are pertinent: Respondent and his working partner, also a car-man, reported to work at 7:30 in the morning. As usual, they received a written work sheet of the work that was to be done that day (R. 31, Exhibit 11, R. 264). Such work required the installation of eight new doors on a four hopper coal car, two doors to each hopper (R. 40); Exhibits 1, 2 and 3 (R. 244-248). This work also required the replacement of four spreaders, one for each pair of doors (R. 44, Exhibits 3, 4 and 5, R. 248-252).

When Respondent and Beaver started work on the said coal car at 7:30 in the morning, they found eight new doors and the four original spreaders under the car (R. 38, 229, 230). Previously the eight old doors had been burned off the car by another crew (R. 38).

Respondent and Beaver proceeded to hang the doors, each weighing about 96 pounds (R. 48). At lunch time, 11:30, or very shortly thereafter they had finished installing the 8 doors (R. 66). Their duty was then to attach the 4 spreaders. They completed the affixing of three of the spreaders, and were in the act of raising the fourth one from the ground up to the bottom part of the doors when the alleged accident to respondent occurred (R. 66, 47-48).

The manner in which they were installing the fourth spreader was the same as for the first three (R. 66). The respondent was under the car on one side and Beaver was under the car on the other, out of sight of each (R. 66, 67). Each was on his knees with the spreader on the ground in

front of him width-wise of the car. The spreader weighed 190 pounds (R. 48). The operation to raise the spreader to its proper place at the bottom of the doors was much the same as the manner in which the doors themselves had been hung. Each man would lift his end of the spreader and key it with a bar into the corresponding hole near the bottom of the door. Bolts would then be inserted in the other corresponding holes (R. 48).

The respondent described the alleged accident in the following manner:

> "I was down on my knees on the hard, slick, slippery ice. When I lifted this door spreader up here my knees went down like that (indicating) and that jerked me down forward, and I felt a terrific snap back in the area of my spine down low (indicating)" (R. 48, 49).

Respondent testified that when it was necessary to patch old doors or to install new ones, it was the custom and practice to burn off only one door from each spreader, leaving the spreader attached to and suspended from the other door, thus eliminating the need of lifting the spreader from the ground in order to affix it to the new or patched doors. He also testified that when the entire car, both the doors and the spreaders, was burned off, it was the custom and practice to have the spreaders riveted onto the doors by another crew at the so-called bench, and to have a crane bring the two doors and the spreader as a unit to the car; that a jack could then be used to raise the unit, the two doors and the spreader, into place (R. 33-45).

Respondent's testimony as to the alleged custom and practice was contradicted by his foreman, John Wilson, and by his co-worker, Beaver (R. 207-209, 218). The petitioner's contention is that such question of fact is not pertinent or material under the facts of the case, as will be later discussed.

At no time from 7:30 in the morning until 3:30 in the afternoon on the day of the alleged accident did the respondent ask anyone for help (R. 66) or make any complaint respecting any icy or snowy condition or the manner of performing the work. Regardless of any custom or practice, the manner of performing the work was of respondent's own choosing, and it was pursued throughout the day. Nothing happened to the respondent until he was installing the fourth and last spreader at 3:30 in the afternoon (R. 66).

There is no claim on the part of the respondent that he received any oral or written instructions from anyone as to the manner in which any of the work was to be performed. He admitted, as is obvious from inspection, that the work sheet (Exhibit 11, R. 264) did not contain any instructions as to how the work was to be done.

> "Q. Mr. Skidmore, will you take Plaintiff's Exhibit No. 11 and read to the jury any instructions on that work card as to the manner in which this work was to be done if such instructions appear on that exhibit? A. Well, this is a work slip. It don't tell anything about how to do it" (R. 66).

Specification of Errors

The Circuit Court erred in holding that the Trial Judge properly denied the motion for a directed verdict or a new trial, and petitioner's request for a special verdict (R. 311, 340).

ARGUMENT

Point 1

Petitioner was not negligent because of the presence of snow and ice in its repair yard.

Petitioner's repair yard in which the respondent worked contained an area of approximately 1,000,000 square feet,

all exposed to the elements and subject to natural accumulations of snow and ice (R. 206). It is not claimed that petitioner maintained a custom or practice of clearing this yard of snow and ice, and it would be obviously impractical for it to attempt to do so. Moreover, no testimony was offered of any such custom or practice existing in similarly situated yards.

Respondent testified that there was snow and ice at the location where he was working (R. 41). He also testified that this condition was the same as existed throughout the petitioner's entire yard (R. 65); and this testimony was corroborated by his co-employee, Beaver, who stated that "it was all ice; everywhere" (R. 218, 219). Under these circumstances it must be held as a matter of law that the presence of snow and ice at the spot where respondent slipped constituted no evidence of actionable negligence.

So far as petitioner's counsel have been able to determine, the case of *Missouri Pacific Railway Company* v. *Aeby*, 275 U. S. 426; 48 S. Ct. 177; 72 L. Ed. 351 is the sole pronouncement of the Supreme Court of the United States on the liability of a railroad to its employee for snow and ice on its premises. There the platform of a railroad station was covered with ice and about three inches of snow on which the respondent, petitioner's station agent, slipped and fell. This Court, in reversing a judgment for the respondent, stated in part:

> "There is no liability in the absence of negligence on the part of the carrier. (Cases cited.) Its duty in respect of the platform did not make petitioner an insurer of respondent's safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances. (Cases cited). The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. (Case cited). No employment is free

from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with snow and ice. Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. (Case cited). It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians that in similar weather are not materially unlike the place where respondent fell. Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty to her."

Although the above case was decided in 1928 when the defense of assumption of the risk was still available under the Act, this Court expressly declared that its decision was not based on either that defense or the defense of contributory negligence. The Court stated at page 430:

> "The facts of this case, when taken most favorably to the respondent, are not sufficient to sustain a finding that petitioner failed in any duty owed. (Case cited). As negligence on the part of the petitioner is essential, we need not consider its contentions in respect of assumption of risk and negligence on the part of respondent."

Similar decisions have been handed down by a number of lower courts to which the same question has been presented in actions brought under the Federal Employers' Liability Act. See:

McGivern v. *Northern Pacific Railway Co.*, 132 F. (2), 213 (8th Circuit);

American Bridge Co. v. *Bainum*, 146 Fed. 367 (3d Circuit);

Wichita Falls & S. R. Co. v. *Wade*, Court of Civil Appeals of Texas, 57 S. W. 2d, 332;

Atchison, T. & S. F. Ry. Co. v. *Ford,* 171 Okla. 516, 43 Pac. 2d. 459.

See also:

Clark v. *Howard,* 88 Fed. 199 (8th Circuit).

One hundred and fifty men were working with the respondent in petitioner's yard during a winter of unusually heavy snow. On the day of the accident there were approximately five inches of snow on the ground (R. 43). To say that the petitioner was negligent whenever it allowed one of its men to step on some of this snow or ice lying on the ground would be to set up such a standard of care as to make the petitioner practically an insurer of its employees' safety. The Act imposes no such burden upon any employer.

POINT 2

Petitioner is not liable if a method of work of the respondent's own choosing was improper or dangerous.

Respondent testified that it was customary in petitioner's yard when all the doors were burned off a car to take the new doors and the spreaders to the door bench and rivet them together before attempting to place them on the cars (R. 35, 45). When respondent reported to work on the morning of the accident, he discovered that all the doors had been burned off a certain car; and he received a work slip (Ex. 11, R. 39, R. 264) calling for the installation of new doors. The work sheet contained no instructions as to the manner in which the installation should be made (R. 66).

Instead of following what he claimed was the customary practice of having the doors and spreaders riveted together before attaching them to the car, respondent, of his own volition and without instructions from anyone, adopted his own method of installation, a method which

he testified emphatically was an improper one and one he had never used before.

> "Q. Was it the proper way of doing that work?"
> A. No, sir. Absolutely not.
> Q. Had you ever, from the first moment, back in the 1920's, when you first went to work for the B. & O. Railroad, right down to the very day of the accident, had you ever done the work in that particular way when it involved the installation of all new doors? A. No, sir; never did" (R. 68).

There is no claim on the part of the respondent that the tools and equipment necessary to attach the doors in the customary manner were not available if he desired to make use of them. The crane, the door bench and the jack were all there to be used. Under these circumstances the petitioner cannot be held responsible for an unauthorized misuse of otherwise adequate facilities by the respondent himself.

It has never been held under the Act that an experienced employee can hold his employer responsible if the employee, himself, chooses an improper or dangerous method of doing his work. In such situations the employee's own negligence is held to be the sole proximate cause of the accident.

McGivern v. *North Pacific Ry. Co. supra.*

> "Temporary conditions created by employees using or failing to use appliances furnished by the employer are not defects for which the employer may be held responsible in damages."
>
> *Brady* v. *Southern R. Co.*, 320 U. S. 476; 64 S. Ct. 232; 88 L. Ed. 239;
>
> *Cartwright* v. *Atchison T. & S. F. Ry. Co.*, 228 Fed. 872 (8th Circuit);
>
> *Wolfe* v. *Henwood*, 162 F. (2d) 998 (8th Circuit).

The respondent's own testimony is that he followed an "improper" method of attaching the hopper doors. This

was contradicted by the testimony of the petitioner's witnesses (R. 207, 218). Assuming it to be so, however, there is not an iota of proof that he was directed by the petitioner to adopt such method. Certainly the petitioner cannot be held liable because it failed to prevent the respondent from doing the work in such manner as he, himself, chose.

Unadilla Valley R. Co. v. *Caldine*, 278 U. S. 139, 142; 49 S. Ct. 91; 73 L. Ed. 224.

> "A failure to stop a man from doing what he knows he ought not to do, hardly can be called a cause of his act."

As a matter of law, the negligence of the respondent was the sole proximate cause of any injury.

POINT 3

The negligence of Respondent was so glaring that it was an abuse of the Trial Court's discretion to refuse to have the jury answer written questions with respect to that and other issues, and such abuse is reviewable by an Appellate Court.

Considering all of the facts in this case, it is inescapable that reasonable men would conclude that the respondent was guilty of substantial contributory negligence. No one could have been more aware of the icy condition than Skidmore. As above recited, he worked all day under such conditions and for several hours he went through identically the same movements that he was performing when his knees slipped apart. He had sought no precautions whatever against that which he now wants this Court to believe was such an obvious and foreseeable danger.

It is respectfully submitted that if the jury had been called upon to answer the proposed written question as to the respondent's contributory negligence, it would have

been alerted to a conscientious and exacting consideration of that issue. If such had occurred, it is respectfully submitted that no reasonable jury could have failed to arrive at the conclusion that respondent was guilty of a substantial percentage of the total negligence.

The petitioner did request the Trial Court to submit such questions in the form proposed or in substantially such form (R. 233, Exhibit C for identification, R. 295). The petitioner has been prejudiced by the Court's refusal. Petitioner excepted (R. 233).

The Circuit Court held that under Rule 49—Federal Rules of Civil Procedure—the Trial Judge has full, uncontrolled discretion in the matter and that, therefore, the Circuit Court could not hold that the Trial Judge erred when, as here, for any reason or for no reason whatever, he refuses to demand a special verdict (R. 332, 333). This, in spite of the fact that the Circuit Court also stated that it was undeniable that the verdict in the present case affords no satisfactory information about the jury's findings, and that such Court deems a special verdict usually preferable to a general verdict (R. 311, 333).

It is respectfully submitted that the Circuit Court erred in not considering such a situation as coming within the general rule that any discretionary matter is reviewable if there has been an abuse of that discretion in the light of existing circumstances.

Charles D. Newton v. *Consolidated Gas Company of New York*, 259 U. S. 101; 66 L. Ed. 845;

> "Having regard to these general principles and the special value of knowledge possessed by the trial court, much weight must be given to its opinion. Ordinarily we may not substitute our judgment for its deliberate conclusions, nor interfere with the exercise of its discretion. But when that court falls into error, which amounts to abuse of discretion, and the cause comes

here by proper proceedings, appropriate relief must be granted."

A. Howard Myers, et al. v. *Bethlehem Ship Building Corporation,* 303 U. S. 41; 82 L. Ed. 638;

Central Trust Co. of New York v. *United States Light & Heating Co., et al.,* 233 Fed. 420 (Second Circuit).

At page 421:

"Even if the matter be one of discretion it is appealable, if the appellant maintain that discretion was abused. *Central Trust Co.* v. *Chicago, Rock Island, etc., Co.,* 218 Fed. 336, 134 C. C. A. 144. It is held that appeal lies."

United States v. *Haupt,* 136 F. (2d) 661 (Seventh Circuit).

At page 672:

"This discretion, however, like any other vested in the trial court is, if abused, subject to review and correction."

City of New Orleans v. *Malone,* 12 F. (2d) 17 (Fifth Circuit).

Conclusion

It is, therefore, respectfully submitted that this case calls for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing the judgment of the Circuit Court below.

WILLIAM C. COMBS,
Counsel for Petitioner.

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OCTOBER TERM, 1947.

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THE BALTIMORE & OHIO RAILROAD COMPANY,

Petitioner,

—against—

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM A. BLANK,
Attorney for Respondent.

WILLIAM SAMUELS,
Of Counsel,
On the Brief.

THE COURT PRESS, N. Y. C.

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THE BALTIMORE & OHIO RAILROAD COMPANY,

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—against—

BUZZY SKIDMORE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The Circuit Court of Appeals, Second Circuit, in a unanimous decision by Frank, L. Hand and Swan, Circuit Judges, affirmed a judgment recovered by Buzzy Skidmore, the plaintiff, hereinafter referred to as the respondent, against The Baltimore & Ohio Railroad Company, the defendant, hereinafter referred to as the petitioner, in an action to recover damages for personal injuries sustained by the respondent, after a trial before Inch, *D. J.*, and a jury in the Eastern District of New York. The action was instituted under the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59) by the respondent against the petitioner to recover damages for injuries suffered by the respondent on January 19th, 1945 because the petitioner negligently supervised the opera-

tion of certain work and failed to furnish respondent with a safe place within which to do his work, and because the petitioner negligently failed to supply respondent with sufficient help for the work then being done, all of which resulted in the falling of a heavy spreader underneath a coal hopper car with the consequent result that the respondent suffered devastating injuries.

Respondent's Contention.

Petitioner's application is opposed because the decision herein, 167 F. 2d 54, and the judgment entered thereon by the Circuit Court of Appeals for the Second Circuit, is not in conflict with applicable decisions of this Court or the decisions of the various Circuit Courts of Appeals. Moreover, Points I and II contained in petitioner's brief in effect argue that the jury verdict in the instant case was against the weight of the evidence. Such an argument before this Court is definitely untenable as is indicated by this Court's decision in *United States* v. *Socony Vacuum Oil Co.*, 60 S. Ct. 811, 310 U. S. 150, 84 L. Ed. 1129, wherein Mr. Justice Douglas remarked at page 856:

> "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review."

Rehearing was denied by this Court 60 S. Ct. 1091, 310 U. S. 658, 84 L. Ed. 1421.

The Facts.

The respondent, a 41 year old car man, employed by and in the petitioner's Lorain, Ohio, car shops for a four year period of time prior to the accident, resided with his wife and three children in Lorain, Ohio (fols. 88, 89, 176).

On January 19th, 1945, at 7:30 A. M., respondent reported for work at the foreman's office, at which time and place Mr. Beaver, another car man, and respondent, assigned by the petitioner as a two man crew received a written work order calling for installation of eight new doors on a specified coal hopper located or spotted on a track in the petitioner's yard (fols. 89, 91-94, 118-122, Exhibit 11, p. 264).

An examination of Exhibits 1-7 (pp. 244-255) reveals that the coal hopper in question was comprised of four hopper compartments and when fully equipped carried four sets of doors, two doors to each set riveted on to a door spreader or cross-bar as part of its undercarriage. When so equipped these coal hopper doors would, by means of latches and tumbler locks connected to said doors (fol. 108), swing open and shut as the occasion called for when unloading or loading coal. Each door weighed 96 pounds and each spreader weighed 190 pounds (fols. 142, 143). Invariably the petitioner would cause one or more of its cars, in for repair, to be located or spotted on any given track before car men reported for work so that a car man's written work order would also indicate the car and track where he was scheduled to work (fol. 96).

Respondent testified that when it was necessary to patch old doors or replace less than complete sets of doors it was the custom and practice in the peti-

tioner's Lorain yard for burner crews to burn off the impaired doors or parts thereof and leave the door spreaders attached to and suspended from the remaining good or unimpaired doors underneath the cars, whereupon two car men acting as a team would together replace the single doors and then key them or tentatively line them up with the suspended spreaders after which a rivet crew would permanently rivet them together. He further testified that when all eight doors of a car hopper had to be replaced with new ones, it was the custom and practice in petitioner's Lorain yard for a burner crew to completely burn down the doors and spreaders, salvaging the spreaders however, whereupon another crew would clean up the debris from under the coal hopper, and carry the salvaged spreaders to a door bench located in another part of the yard. There, respondent testified, the door bench crew would permanently rivet the new doors to the salvaged spreaders after which a crane or tractor crew would cart the attached doors and spreaders back to the spotted coal hopper and deposit them across the rails and under the hoppers. Then the car man crew consisting of three men, not two men, would with the aid of a large hydraulic jack, hang the complete units in their required places on the undercarriage pins of the coal hopper (fols. 97-139, Exhibits 7, 8, 9, 10, pp. 256-263).

All of the respondent's testimony relating to the prevailing custom and practice in the petitioner's Lorain yard at the time of the accident was corroborated by Mrs. Skidmore, employed by the petitioner as a car man's helper at that time and for two years prior thereto (fols. 405-414).

John Wilson, respondent's foreman also corroborated respondent's testimony on custom and practice

(fols. 627, 643-648). Wilson further testified that if all four doors on one side of the car were burned off, replaced with new doors, and then the four doors on the other side of the car were similarly burned off and replaced with new doors, then the spreaders would, all during this operation, remain suspended on the old and new doors respectively without ever dropping to the ground. He, however, did not believe that to be a good practice because as he expressed himself, "You will lose too much time that way" (fols. 646-649). Edgar Beaver, the other car man who was working with the respondent as a team at the time of the accident, also corroborated respondent's testimony on the prevailing custom and practice in petitioner's Lorain yard (fols. 672-677).

When Beaver and respondent started working on the spotted coal hopper car at 7:30 that morning they noticed that all eight of the old doors and the four connecting spreaders had been burned down. The debris was lying underneath the coal hopper and the salvaged four spreaders were separated and detached from the eight doors. Subsequently that day eight new doors, not attached to the spreaders, were brought to Beaver and respondent where the coal hopper was spotted (fols. 113, 138, 685-689).

On that day and for a continued period of *at least one month prior thereto* the entire yard was covered with snow and hard ice, notwithstanding the fact that the petitioner employed a couple of hundred men in that yard daily (fols. 122-125, 194, 195, 617, 654, 655). Neither before nor during the work progress of Beaver and respondent that day did any of petitioner's employees clear up the hard ice condition where Beaver and the respondent were working (fol. 124).

When the eight new doors were delivered to Beaver and the respondent they proceeded to hang them and the spreaders separately although respondent had never installed or seen any one install doors and spreaders in that manner (fols. 131-134). At about 3:15 P. M., while attempting to install the last spreader (fols. 143-146), respondent testified:

> "Q. In other words, just before the accident the last unit you and Beaver were trying to get on was this 190 pound spreader; is that correct? A. That is correct.
>
> Q. Now, will you tell us from that point on, where you were, how you worked and just what happened, Mr. Skidmore? A. Well, Mr. Beaver was on one side of the car and I was on the other, and we had to get down on our knees. I was down on my knees on the hard, slick, slippery ice, and had the bar stuck through the holes through the door for to bring our spreader up to have it ready to hook it on.
>
> Q. In other words, the idea was to get the spreader high enough you had to use a pull to get it up and then use the bar to stick through a hole in the door and get it through a hole of the spreader? A. That is correct.
>
> Q. And then put in a temporary bolt? A. Yes, sir.
>
> Q. All right, go on from there. You say you were down on your knees? A. I was down on my knees on the hard, slick, slippery ice. When I lifted this door spreader up here my knees went down like that (indicating) and that jerked me down forward, and I felt a terrific snap back in the area of my spine down low (indicating)."

POINT I.

Petitioner was negligent in directing respondent to perform such laborious work in an area continuously covered with snow and hard ice over a long period of time.

Both sides agree that on the day of the accident complained of and for a continued one month period of time prior thereto, the petitioner's entire yard, including the place where respondent was assigned to work that day, was completely covered with snow and hard ice notwithstanding the fact that all during this period of time the petitioner employed a couple of hundred men in that yard daily (fols. 122-125, 194, 195, 617, 654, 655).

Respondent further testified, and his testimony was in no wise contradicted, that neither before nor during the work progress of Beaver and himself that day did any of petitioner's employees clear up the hard ice condition where Beaver and the respondent were working that day (fol. 124).

That the petitioner directed the work to be done in the dangerous area complained of is evidenced by its written work order calling for installation of eight new doors on a specified coal hopper located or spotted on a track in the petitioner's yard which was completely covered with snow and hard ice (fols. 92, 118, 120). The respondent further testified:

> "Q. Then would it be the custom at the yard, and was it carried out during the years that you were a car man, to spot or locate a car at a particular place in the yard where you were to go to work? A. Well, they would spot them there in

the yard just any place where they were doing the work, you know.

Q. That is what I mean. They would spot them for you before you would come to work? A. That is right.

Q. Then when you got your written order it would call for doing work on a certain car located on a certain track? A. That is right" (fol. 96).

It is therefore abundantly clear that respondent had absolutely nothing to do with the spotting or locating of the coal hopper in question on the track in the area where the work was specifically called for.

Regarding the petitioner's contention contained in the first point of petitioner's brief, one is moved to ponder what interpretation the petitioner places on the 1939 amendments to the Federal Employers' Liability Act. Concededly, the petitioner owed respondent the duty to furnish him with a safe place to work. It must also be conceded that by the 1939 amendments respondent did not assume the risks of his employment.

Does it not suffice, at least to the extent of creating a jury question, that the petitioner, notwithstanding the fact that it employed more than two hundred men daily in the Lorain Yard at the time of the accident, directed by written order that the work in question be done in an area completely covered by snow and hard ice?

Would the petitioner have this learned Court believe that the jury should not be allowed to deliberate on this most vital issue? Does the petitioner sincerely believe that under these circumstances and the conditions existing at the time of the injury, it actually provided respondent with a safe place to work?

If the petitioner had a mind to be guided by the Congressional amendments of 1939, or if at least in some slight degree it considered the safety of its employees it would in this case have caused that area of hard ice to be dissolved or chopped up and removed, *before* assigning respondent to perform such dangerous and laborious work at the place where the coal hopper in question had been spotted or located.

That an icy condition existing two days prior to an accident presented a jury question as to negligence was fairly recently decided. Under such circumstances what interpretation can this Court place on a similar icy condition existing for more than one month continouously prior to the accident?

In *Rashaw* v. *Central Vermont Ry., Inc.,* 133 F. 2d 253 (decided February 3, 1943, C. C. A., 2nd Cir.), Chase, Circuit Judge, ably held at pages 254 and 255:

> "* * * we shall treat his fall for the purposes of this appeal as one from the bridge.
>
> There was no substantial dispute as to the condition of the bridge. The ties on which the rails rested were very slippery because of ice which was thick enough to make them rounded on the top. * * * There was undisputed evidence that the bridge had been in about the same icy condition *two days* before the accident when the conductor walked over it with the assistant superintendent of the northern division of the railroad.
>
> * * * *
>
> The case as thus made presented a jury question as to the negligence of at least the defendant railroad *in allowing the bridge to remain in its icy condition when the plaintiff's intestate was required to cross it to do his work.*" (Italics the writer's.)

Another case dealing with similar facts recently decided, is *Ramsouer* v. *Midland Valley R. Co.*, 135 F. 2d 101 (C. C. A., Eighth Cir., decided April 7, 1943), where Gardner, Circuit Judge, cogently commented on pages 105 and 106:

> "* * * There had been freezing weather, alternating with milder temperatures, *for about a week,* with some precipitation in the nature of sleet and snow. *The sleet and snow had not recently fallen.* * * *
>
> Viewing the evidence in the light most favorable to plaintiff, we think it presented a genuine issue of fact from which a jury might reasonably decide that Ramsouer's injuries resulted in whole or in part from the negligence of the defendant (1) in that it failed to maintain this switch track in a reasonably safe condition, or place it in such condition *by removing the ice and snow at least from the curve therein prior to attempting the switching operation;* * * *." (Italics the writer's.)

See also *Raudenbush* v. *Baltimore & O. R. Co.*, 160 F. 2d 363 (C. C. A., Third Cir.), decided February 19, 1947, where the Court aptly remarked on page 367:

> "The place of work here was a switch yard. It is a place of moving cars and locomotives and no reason exists why, *within the confines of such yard, the employer should not be required to exercise a reasonable degree of care to prevent an accumulation of snow or ice in such quantity and location as would constitute a menace to the safety of the employees in the performance of their various duties.* * * *" (Italics the writer's.)

Under the rulings of the various Circuit Courts of Appeals, it would conclusively appear that no conceivable reason existed which would entitle the petitioner in this action to assume it had the right to direct its employees to perform laborious work in areas completely and continuously covered by snow and hard ice for more than one month prior to the accident as was proven in this case.

See also *Lilly* v. *Grand Trunk Western R. Co.*, 63 S. Ct. 347, 317 U. S. 481, 87 L. Ed. 411, where Mr. Justice Murphy delivering the opinion of the Court clearly enunciated on page 351:

> "The use of a tender, upon whose top an employee must go in the course of his duties, *which is covered with ice* seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated." (Italics the writer's.)

Foreseeability, it is believed, is the crux of this case. Could the petitioner have foreseen that under all of the prevailing conditions on January 19th, 1945 such an accident could have occurred?

The most recent cases decided by the Supreme Court of the United States and the various Circuit Courts of Appeals indicate that the Trial Court in this action did not err in submitting to the jury for its ultimate determination the factual issues here involved.

In *Lillie* v. *Thompson*, 68 S. Ct. 140, decided on November 24th, 1947, the petitioner a 22 year old female telegraph operator was employed by the respondent's railroad to work alone between the hours of 11:30 P. M. and 7:30 A. M. in a one room frame building situated in an isolated part of the railroad's

yard. The petitioner's duties were to receive and deliver messages to men operating trains in the yard. About 1:30 A. M. on the night of her injury, petitioner responded to a knock thinking that some of the respondent's trainmen were seeking admission. She opened the door and before she could close it a man not in the respondent's employ entered and beat her with a large piece of iron, seriously and permanently injuring her.

The petitioner sued for damages under the Federal Employers' Liability Act and her contention was that she was injured as a result of the respondent's negligence in sending her to work in a place he knew to be unsafe without taking reasonable measures to protect her.

The District Court dismissed the complaint for failure to state a cause of action and entered summary judgment for the respondent. The Circuit Court of Appeals affirmed without opinion (6 Cir., 162 F. 2d 716). The Supreme Court in a *per curiam* opinion appropriately held, on page 142:

> "We are of the opinion that the allegations in the complaint, if supported by evidence, will warrant submission to a jury. * * * That the foreseeable danger was from intention or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

See also *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649; *Lavender* v. *Kurn*, 327 U. S. 645; *Blair* v. *B. &*

O. R. Co., 323 U. S. 600; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29; *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; and the second *Tiller* case, 323 U. S. 574; *Jesionowski* v. *Boston & Maine Railroad*, 67 S. Ct. 401; *Boston & M. R. R.* v. *Meech*, 156 F. 2d 109 (C. C. A. 1), cert. denied 329 U. S. 763; *Boston & M. R. R.* v. *Kyle*, 156 F. 2d 112 (C. C. A. 1); *Fleming, et al.* v. *Husted*, 164 F. 2d 65 (C. C. A. 8).

In that connection this Court is respectfully referred to the case of *Keith* v. *Wheeling & L. E. Ry. Co.*, 160 F. 2d 654, wherein Hicks, Circuit Judge, after elaborating on the opinions contained in the most recent cases passed upon by the United States Supreme Court, dealing with this question, says the following on page 658:

> "We do not review the facts of these cases but it is plain from their examination that the authority of courts *by direction of a verdict*, to withdraw from the consideration of a jury matter bearing upon the question of the defendant's negligence and its proximate relation to the injury *is now very restricted indeed.*" (Italics the writer's.)

Under all of the circumstances in this case therefore the jury certainly had a right to pass on so integral a question when determining that petitioner's negligence brought about this accident in whole or in part.

The cases cited in petitioner's brief relating to this subject, more particularly contained in its first point, are clearly distinguishable from the facts involved in the instant case and the writer therefore presumes to make some comment on said cited cases.

In *Missouri Pac. R. Co.* v. *Aeby,* 48 S. Ct. 177, 275 U. S. 426, 72 L. Ed. 351, appearing on pages 9 and 10 of the petitioner's brief, the Court in reciting the facts there involved said, among other things, on page 179:

> "* * * When it rained, there accumulated in this and other depressions on the platform puddles of water, which gradually disappeared. By the time of the accident, the depression in front of the steps had become somewhat larger and deeper, by reason of rains and constant use. Its surface was rough. *No ice had formed there after respondent came. The platform was dry the evening before the accident.*" (Italics the writer's.)

It is therefore apparent that the facts themselves are clearly distinguishable in that the ice formation in that case existed for only a matter of a few hours prior to the accident, whereas in the instant case it continued over a period of more than one month, with which fact the parties to this action are in complete accord.

Moreover, immediately following the quoted portion appearing on pages 9 and 10 of petitioner's brief, relating to the *Missouri* case, Mr. Justice Butler, writing for the Court, aptly remarked on page 179:

> "* * * The obligation in respect of station platforms and the like owed by carriers to their passengers or to others coming upon their premises for the transaction of business *is greater* than that due their employees accustomed to work thereon. *The reason is that the latter, familiar with the situation, are deemed voluntarily to take*

the risk of known conditions and dangers." (Italics the writer's.)

The *Missouri* case was decided on January 3rd, 1928, some eleven years prior to the abolishment of the assumption of risk defense. (See Title 45 U. S. C. A., Section 54.) No longer are federal employees, under the Federal Employers' Liability Act, deemed voluntarily to assume the risk of known conditions and dangers. That the Courts so interpret in this day and age the holding in the *Missouri* case is clearly apparent from an examination of the opinion in *Handy* v. *Reading Co.*, 66 F. Supp. 246, where the Court held, on page 249:

> "To sustain its motion for judgment *non obstante veredicto,* defendant relies upon the cases of *Missouri Pac. R.* v. *Aeby,* 1928, 275 U. S. 426, 48 S. Ct. 177, 72 L. Ed. 351, * * *.
>
> Furthermore, it will be seen that the cases relied upon by the defendant were decided before the Amendment of 1939, withdrawing assumption of risk as a defense in Federal Employers' Liability cases. The decision of the Supreme Court in the *Tiller* case, *supra,* indicates that the decision in the *Aeby* case was responsible in part for the Amendment of 1939."

In *Tiller* v. *Atlantic Coast Line R. Co.*, 63 S. Ct. 444, 318 U. S. 54, 87 L. Ed. 610, Mr. Justice Black ably remarked on pages 446 and 447:

> "* * * We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing

its name to 'non-negligence'. As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 45 U. S. C. A., Section 1 *et seq.*, 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name;' and no such result can be permitted here."

The case of *McGivern* v. *Northern Pacific Railway Co.*, 132 F. 2d 213 (8th Cir.) cited on page 10 of petitioner's brief, is clearly distinguishable and becomes most evident upon examination of certain of the quoted facts and holdings therein enunciated by Gardner, Circuit Judge, on page 217, wherein he states:

"* * * The steps on this switch engine were, when the crew began to use them, *free of snow.* The accumulation of snow and ice *during the progress of the work* was a natural and normal consequence due to the *recently fallen snow in the yards.* There were no inherent imperfections in these steps rendering them less fit for the use for which they were intended. * * * The condition of these foot boards was continually changing because of the snow being carried on to them by the workmen and packed down. * * *

* * * Under the prevailing conditions which were perfectly obvious snow on the foot boards could not have been avoided. It was a natural and necessary result of existing climatic conditions." (Italics the writer's.)

How in all sincerity can facts such as are contained in the *McGivern* case be compared with the facts in the instant case where the snow and hard ice condition existed for more than a month?

The case of *American Bridge Co.* v. *Bainum,* 146 Fed. 367 (3rd Cir.) also appearing on page 10 of petitioner's brief, is not a Federal Employers' Liability case, and is in no wise in point with the facts herein involved.

The *Wichita Falls & S. R. Co.* v. *Wade,* Court of Civil Appeals of Texas, 57 S. W. 2d, 332, also appearing on page 10 of petitioner's brief, was decided on December 24, 1932 prior to the abolishment of the assumption of risk defense and the decision therein was clearly based on a defense of assumption of risk for there the Court held, on page 337:

> "* * * we believe that the defense of assumed risk was conclusively established, independently of the issue of defendant's negligence."

The cases of *Atchison, T. & S. F. Ry. Co.* v. *Ford,* 171 Okla. 516, 43 Pac. 2d, 459 and *Clark* v. *Howard,* 88 Fed. 199 (8th Cir.) both cited on page 11 of petitioner's brief, were similarly cases decided prior to 1939 when the defense of assumption of risk still prevailed for the benefit of railroads.

POINT II.

The manner in which the work was being done on the day of the accident was not of respondent's own choice.

As to the condition in which Beaver and the respondent found the spotted coal hopper the morning of the accident, Beaver, petitioner's witness, testified (fol. 669):

"Q. And the job as you did it that day, as you

now say, that car had all the doors burned off? A. Yes, but we were putting in single doors and spreaders separate."

In the same vein, Wilson, petitioner's witness, also testified (fol. 643):

"Q. There is no question in your mind but that all the doors, the old doors, the eight doors, were burned off? A. That is right, they were burned off."

Respondent on that score testified (fol. 113):

"Q. Now, when you came to work on the morning of the accident how did you find the car that you received working orders on? What condition was it in? A. It had all been burned down clean; all the doors, spreaders, everything, dropped underneath the car.

Q. And was the spreader, were the spreaders that you say were under the cars, were they there without doors attached? A. Yes, sir."

These facts coupled with the assignment called for in the work order of the day, Exhibit 11 (p. 264), lead to the inescapable conclusion that the petitioner directed the work on said coal hopper be done by Beaver and respondent in the manner specifically employed. If the petitioner desired that the work be done in any other manner, it would have had another crew clean up the debris; cart the old spreaders to the work or door bench where still another crew would rivet the four salvaged spreaders on to eight new doors; whereupon a third crew would by means of a crane or tractor haul back the attached doors and spreaders to the spotted coal hopper and deposit them across the rails and under the hopper. Then the car-man crew consisting of three and sometimes

four men, with the aid of a large hydraulic jack would hang the complete units under the coal hopper.

At one point in his testimony, Beaver, petitioner's witness, testified that the method employed on that day by him and respondent was a customary one when he said (fols. 652-654):

> "Q. Now, you heard Mr. Skidmore describe the manner in which you were putting up the spreaders on that day in question? A. I did.
>
> Q. Would you say that that was the ordinary custom and practice and that you had followed it yourself for a long time? A. I had put them up that way myself, yes.
>
> Q. Do you recall ever working with Mr. Skidmore on that particular job before? A. No. I can't say that I did.
>
> * * * *
>
> Q. Have you observed other men in the yard working in two's putting up spreaders the same way? A. Yes, I have seen lots of them do it that way.
>
> Q. You have seen lots of them do it that way? A. Yes."

Wilson, another witness for petitioner, corroborated this testimony when he said (fol. 621):

> "Q. —will you say that the work was done that day in the usual and customary manner? A. That is right."

It conclusively appears therefore that the method employed that day by Beaver and the respondent was one of the customary methods practiced in petitioner's yard although respondent had never personally installed or seen any one install doors and spreaders

in that manner in the petitioner's yard (fols. 132, 133). The only plausible deduction therefore is that Wilson, the petitioner's foreman, with full knowledge of the fact that the undercarriage of the coal hopper had been completely burned down, ordered, and directed that the work be done in the manner it actually was being done by Beaver and respondent at the time of the accident.

True it is, that this practice called for only two men to hang the doors and spreaders. Petitioner approved that unsafe method of doing the work because it saved time, a factor most essential to the petitioner for as its witness, foreman Wilson, testified (fol. 648):

> "A. Well, that wouldn't be good practice, because that work has to be done before the men get over there. You will lose too much time that way.
>
> Q. You will lose time? A. That is right."

That a safer method of doing the work, calling either for a three or four car-man crew rather than a two man crew was sometimes followed by the petitioner is not only deducible from respondent's testimony heretofore referred to, but from that of petitioner's witness, Beaver, who testified (fols. 669, 670, 675, 676):

> "Q. All right. Now, wasn't it the practice, sir, the company practice there, that when you had to put in—when the car was burned off all around so that the doors were burned off and the spreader was burned down, that you would use three and four men for the job of installation? A. Well, if it was a full unit both doors and spreaders, they used three sometimes, and I have saw four.

Q. And the job as you did it that day, as you now say, that car had all the doors burned off? A. Yes, but we were putting in single doors and spreaders separate.

* * * *

Q. But the car was burned off all around? A. Yes.

* * * *

Q. And where you put in all new doors in a car that has been burned all the way down, now you have to put in a unit, don't you, of doors and spreaders, because the doors have been burned away and the spreaders have been burned away? A. If they are all burned down.

Q. Now, they have a work bench where spreaders are riveted on to doors haven't they? A. Yes.

Q. And when they do that the whole unit is brought over by a tractor or a crane? A. Yes.

Q. And swung under as far as you can get it under the car? A. That is right.

Q. Then the whole unit is jacked up by a jack which does the lifting instead of your back muscles; isn't that so? A. That is right.

Q. And the man comes along and just works the jack, and that lifts the weight up into place? A. Yes.

Q. And the pins are put in? A. Right.

Q. That is the practice that obtained out there? A. Yes.

Q. And you saw it done that way? A. Yes, sir."

It is therefore clearly apparent that the petitioner employed two separate methods of doing that type of work in its yard, but elected to use the unsafe method to save time, wages and manpower.

Our courts have uniformly held that although railroads adopt and follow certain customs and practices of doing different types of work in their yards, when it is once proven that such customs and practices are dangerous in nature, sufficient negligence is established to warrant jury verdicts against them for injuries sustained as a result thereof.

In *Fletcher* v. *Baltimore & Potomac Railway,* 168 U. S. 135, 18 S. Ct. 35, there existed a custom and practice on the defendant's railroad that employees of the railroad were allowed the privilege of bringing back with them for their own individual use for firewood, sticks of refuse timber left over from their work after repairing the defendant's roads, such as solid pieces of bridge timber, cross-ties, etc. It was the constant habit of the men, over a number of years, to throw off these pieces of firewood while the train was in motion at such points on the road as were nearest their homes, where the wood was picked up and carried off by some of the members of their families or other persons waiting there for it. The only caution given the men on the part of the servants or agents of the railroad was that they should be careful not to hurt anyone in throwing the wood off. The foreman of the gang was the man who usually gave such instructions.

In that case, as the train passed the plaintiff, an employee of the defendant, another workman on board threw from the car on which he was standing, a stick of bridge timber about six inches square and about six feet long. It struck the ground and rebounded, striking the plaintiff, and permanently injuring him.

Mr. Justice Peckham, who delivered the opinion of the Court, cogently commented, at page 142:

> "* * * If, however, it had been proven in that case that it was the custom on the part of the porters on that car to throw these bundles off while the train was in motion, and that this custom was known to the officers of the company, and was permitted by them, with the simple injunction that the porters should take care, and not hurt anybody, and *if the jury found that the act was one dangerous in its nature, we think there is no doubt that the defendant would be liable for the injuries resulting from any one of such acts.*" (Italics the writer's.)

In *Palum* v. *Lehigh Valley R. Co.,* a most recent case decided by the Circuit Court of Appeals, Second Circuit, 165 F. 2d 3, decided January 7th, 1948, dealing with customs and practices of railroads, Augustus N. Hand, Circuit Judge, aptly remarked on page 5:

> "It would certainly have been *safer* to send a fireman over the route who was familiar with it and there was evidence indicating that this *safer method,* if not invariably practiced, was generally employed. In such circumstances we think it was required by the recent decisions of the Supreme Court to leave to the jury the question of whether that *safer method* should not have been chosen." (Italics the writer's.)

In *Boston & M. R. R.* v. *Meech,* 156 F. 2d 109, Woodbury, Circuit Judge, appropriately held, on page 111:

> "It may be that the locomotive was being operated in the way *usual and customary* for the maneuver which resulted in the death of the de-

> cedent, but nevertheless the fact remains that it could have been operated *more carefully. Another man could have been assigned to ride with the hostler to keep a lookout from the fireman's side of the cab or from the rear of the tender for workmen in the vicinity of the engine house, who might be presumed to be busy and hence inattentive at times to their own safety,* * * *." (Italics the writer's.)

A writ of certiorari to the United States Supreme Court in that action was denied on October 28, 1946, as reported in 67 S. Ct. 124.

Interesting is this language because of the fact that in that case the Court properly reasoned that another man could have been assigned on the job in question. The same situation exists here for had the defendant ordered this job done with a three or four man crew on secure ground, this accident would never have occurred.

Further, on the question of using safer methods as distinguished from practices usual and customary amongst railroads, this Court's attention is called to the case of *Boston & M. R. R.* v. *Kyle,* 156 F. 2d 112, where in a *per curiam* opinion, the Court held:

> "In affirming the judgment below it will suffice to say that there is ample testimony in the record to indicate, first, that although the plaintiff *was experienced in the kind of work he was doing when he was hurt,* he was at that time working under the direction and subject to the orders of his fellow machinist, and, second, that although the latter directed that their work be done in the usual or customary way, *there was a safer way in which it could have been done* * * * and that, *if this safer method of procedure had been fol-*

lowed, the injury which befell the plaintiff would not have occurred." (Italics the writer's.)

It is therefore apparent that the establishment of a custom and practice on any given railroad as to the manner of doing a certain type of work, does not in and of itself exempt the railroad from liability. Juries at all times are permitted sufficient leeway to deliberate as to whether or not the established customs and practices are dangerous ones, or, in the alternative, whether safer methods could not have been employed under the circumstances. Respondent contends therefore that the jury in the instant case was properly allowed to pass on this question and, as is evidenced by its verdict, actually did find that the petitioner's practice of using a two car-man crew on this assignment was a dangerous one and that it was safer to use its other practice of assigning a three car-man crew and using its other paraphernalia, such as work and door benches including their crews, crane and/or tractor equipment and maneuvers including its crew, etc.

For the reasons incorporated and outlined herein it becomes unnecessary to comment upon the cases cited in the second point of petitioner's brief since those cases do not apply and are distinguishable from the facts in the instant case. In addition the cases of *Cartwright* v. *Atchison T. & S. F. Ry. Co.,* 228 Fed. 872 and *Unadilla Valley R. Co.* v. *Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224, were decided prior to the abolishment of the assumption of risk defense.

POINT III.

The refusal of the Trial Judge to direct the jury to bring in a written verdict did not constitute reversible error.

Immediately prior to summation of both counsel, petitioner's attorney submitted to the Court Exhibit C for Identification as the proposed form of a written verdict by the jury. In denying said request the Court remarked:

> "The Court: I return your request. It is really nothing more than will be covered by my charge to the jury. As to having a written verdict, I see no necessity for it at the present time."

to which procedure petitioner's counsel excepted (Exhibit C, p. 295, fols. 697-699).

On page 14 of his brief, petitioner's counsel claims that as a result of the Trial Court's ruling on this request,

> "The defendant has been prejudiced by the Court's refusal."

This contention is clearly fallacious.

It is conceded that if the Court thereafter failed to include in its charge, the general contents of said exhibit and petitioner's counsel timely took exception thereto, thereby affording the Trial Court an opportunity to cure such omission, then reversible error would have been committed upon the Court's refusal to amplify its charge or direct the written verdict requested.

An examination of the record, however, reveals beyond any question of doubt that all the matter contained in Exhibit C was fully covered in the Court's charge, all of which petitioner's counsel fully appreciated, for when the Court upon completion of its charge specifically inquired whether petitioner's counsel took any exceptions or desired any requests, Mr. Combs remarked:

> "Mr. Combs: I have none, your honor" (fols. 723, 700-724).

Petitioner's counsel in a criticizing vein further argues, on page 14 of his brief, that:

> "The Circuit Court held that under Rule 49—Federal Rules of Civil Procedure—the Trial Judge has full, uncontrolled discretion in the matter and that, therefore, the Circuit Court cannot hold that the Trial Judge erred when, as here, for any reason or for no reason whatever, he refused to demand a special verdict."

Hughes on Federal Practice, interpreting said rule, states:

> "Sec. 24303. Special Verdict Discretionary. Under the rule the court is not required to submit a special verdict in any case. The rule merely authorizes the court to submit a cause on special verdict, the language of the rule being 'may' thus leaving it within the discretion of the court whether or not a cause should be so submitted."

Concededly therefore the Trial Judge may make one of two rulings in this type of case, namely, to decide whether to accept at the jury's hands a general or a special written verdict. For defeated counsel to

whimper immediately that this discretionary power has been abused merely because the Trial Court directed that a general verdict be returned and to permit such counsel to accuse an Appellate Court of having erred in not reversing for this reason, is similarly fallacious.

True, much has been written by some Appellate Courts on the desirability and preference of special jury verdicts over general jury verdicts to the end that Appellate Courts could more easily detect error creeping into jury deliberations.

With full realization that the following argument is being submitted to the highest Appellate Court of this great and revered land, the writer is moved to inquire if our worthy and learned Federal Trial Judges, bearing their most difficult tasks during the tenure of a civil jury trial, as in the instant case, are in no wise to be considered? Are they not sufficiently competent and adequately equipped to be entrusted with the discretionary power actually afforded them under said rule to properly determine in any given case whether their juries shall hand down in one instance a general verdict and in another a special verdict? Are our much respected Federal Trial Judges not in the best position, having questioned and carefully observed the individual jurors during the course of a civil jury trial, to intelligently determine the type of verdict the particular jury shall deliberate on as being fair to all litigants concerned?

The writer sincerely reasons that the rule in question was so promulgated by this very learned and respected Court with some such thoughts in mind and therefore fails completely to follow the untenable argument of the petitioner's counsel in his contention

that the trial judge abused his discretionary powers in this instance.

That the Circuit Court of Appeals below, by its unanimous affirmance, similarly rejects petitioner's contention, is most evident from an examination of the following excerpts included in the opinions of Circuit Judges Frank and L. Hand. Judge Frank states, 167 F. 2d 54, at pages 55 and 56:

> "* * * Since the judge properly charged with respect to a deduction for contributory negligence, pursuant to the Act, we must assume that the jury made such a deduction. * * *.
>
> Defendant argues that the judge erred in denying its request for a special verdict. We cannot agree."

Again on pages 66 and 67:

> "* * * the federal district judge, under the Rule, has full, uncontrolled discretion in the matter: * * *.
>
> Accordingly, we cannot hold that a district judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict, * * *."

L. Hand, Circuit Judge, remarks on page 70:

> "I concur in holding that there was evidence to support the verdict, and that it was not an error to refuse to take a special verdict along with a general verdict."

In *W. B. Grimes Dry-Goods Co.* v. *Malcolm, et al.*, 17 S. Ct. 158, 164 U. S. 483, Mr. Justice Harlan aptly remarked on page 160:

> "The submission of special questions to the jury

is, under the statute, in the discretion of the court. It was so held in *Railway Co.* v. *Pankhurst,* 36 Ark. 371, 378. Independently of the statute of Arkansas, this court has held that 'the personal conduct and administration of the judge in the discharge of his separate functions was neither practice, pleading, nor a form or mode of proceeding', within the meaning of the practice act of June 1, 1872 (17 Stat. 197), now section 914 of the Revised Statutes, and that 'the statute was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which in that respect he is clothed.' *Association* v. *Barry,* 131 U. S. 100, 119, 9 Sup. Ct. 755, 761."

See also, *Erie R. Co.* v. *Downs,* 250 Fed. 415, decided by the Circuit Court of Appeals, Second Circuit, *prior* to the abolishment of the assumption of risk defense in the Federal Employers' Liability actions, where Rogers, Circuit Judge, cogently commented at page 420:

"There was no special question submitted as to whether the accident happened as a result of one of the risks which defendant claimed that the plaintiff assumed. If the plaintiff had assumed the risk, that fact constituted an absolute defense. The defendant claims that by not including the question as to whether plaintiff had assumed the risk in the number of questions upon which the court required a special finding it in effect withdrew from the consideration of the jury that question. Counsel for defendant expressly requested the submission of a special question on assumed risks. The court said: 'I decline to send that as a special question to the jury'. Counsel took an exception. The court then said: 'That they will take care of in their general verdict'. *We are*

not prepared to say that this constituted reversible error, as the jury had been fully instructed on that subject, and must have understood perfectly that, if plaintiff assumed the risk, he could not recover." (Italics the writer's.)

In *McAuliffe* v. *New York Central & H. R. R. R. Co.*, 172 App. Div. 597, 158 N. Y. S. 922 (2d Dept.), the Court remarked at pages 926 and 927:

> "Defendant's counsel asked the trial court to direct the jury to find specially 'what proportion of the plaintiff's negligence contributed to the accident, in case they should find that the plaintiff's negligence was not the sole cause of the injury'. This the court denied, to which defendant excepted. The federal statute, by which contributory negligence lessens the damages, is borrowed from the early negligence rule in Illinois, and the existing Georgia practice now embodied in Georgia statutes (Thornton, Fed. Emp. Liability (3d Ed.) Sec. 78); also from the admiralty rule of apportionment (60 Cong. Record, p. 4536, quoted by Thornton, p. 169).
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> At the date of this trial (February 15-24, 1915) juries did not generally return special verdicts under this statute. * * *
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> * * * Yet, according to the trial practice as understood and followed a year ago, both in the federal and state tribunals, we cannot say that the court committed reversible error in refusing counsel's request."

In support of petitioner's contention that the Circuit Court erred in declaring that the trial judge had full, uncontrolled discretion in this matter and that therefore it could not hold the trial judge erred when he refused to demand a special verdict, counsel

for petitioner cites, on pages 14 and 15 of his brief, six separate Federal Court decisions none of which, it is respectfully argued, apply to the proposition of law here involved.

The case of *Charles D. Newton* v. *Consolidated Gas Company of New York,* 259 U. S. 101, 66 L. Ed. 845, involved Equity Rule 68 (33 Sup. Ct. XXXVIII) which provided as quoted by this Court on pages 104, 105:

> "The District Court may * * * appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the District Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct."

In that case the District Court allowed a duly appointed Special Master for 282 days work, fees amounting to $118,000. This Court in reducing said amount to $49,250 cogently commented, page 105:

> "Discretion within intendment of the rule is a judicial one. It does not extend to arbitrary and unreasonable action; and our review is limited to the question of its improvident exercise."

The cases of *Central Trust Co. of New York* v. *United States Light and Heating Co., et al.,* 233 Fed. 420 and *City of New Orleans* v. *Malone,* 12 F. 2d 17, dealt with the same proposition, namely, the fixing of fees by a Federal District Judge.

The case of *A. Howard Myers, et al.* v. *Bethlehem Ship Building Corporation,* 303 U. S. 41, 82 L. Ed.

638, stands for the principle that since the District Court had no jurisdiction of a shipbuilding company's suit to enjoin the National Labor Relations Board from holding hearings on a complaint filed by the Board against the company, the Circuit Court of Appeals should have reversed the District Court's decree granting a preliminary injunction.

Central Trust Co. v. *Chicago, Rock Island, etc., Co.*, 218 Fed. 336, 134 C. C. A. 144, involved the denial by a Federal District Judge of a petition for leave to intervene in a foreclosure suit where the Appellate Court held, on page 339:

> "The general rule is that the denial of a petition to intervene is discretionary and therefore not appealable. The discretion, however, must be exercised in accordance with recognized judicial standards."

United States v. *Haupt, et al.*, 136 F. 2d 661, was a criminal lawsuit involving many questions, one of which dealt with the Trial Court's refusal to sever on motion of some of the defendants whereupon the Appellate Court held, on page 672:

> "The crux of the attack upon the alleged unfairness of the trial revolves in the main around the court's denial of defendants' motion for severance. It is earnestly insisted that it was impossible under the circumstances for the individual defendants in a joint trial to obtain a fair and impartial hearing. * * * The main argument as to the alleged unfairness of a joint trial has to do with the prejudicial effect of certain evidence offered by the government."